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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 PATRICK PIERCE,
12 Plaintiff,

13 v.

14 WELLS FARGO BANK,
15 and DOES 1 through 20,
16 Defendants.

CASE NO. C08-01554 JF (HRL)

**PIERCE'S EVIDENTIAL
OBJECTIONS TO, AND MOTION
TO STRIKE, JOHNSON
DECLARATION, AMENDED
ERRATA OF WELLS FARGO
BANK, AND PORTIONS OF
REPLY BRIEF**

Date: June 27, 2008
Time: 9.00 a.m.
Place: Courtroom 3, 5th Floor
Judge: Hon. Jeremy Fogel

19 PLEASE TAKE NOTICE THAT plaintiff Patrick Pierce ("Pierce") hereby objects to the
20 admissibility of the following purported evidence, and the submissions based on such purported
21 evidence, for the reasons stated below, and requests that all such objectionable purported evidence
22 and content be stricken from the record:

23 **1. Declaration of Shelly L. Johnson** (Document 37)

24 Pierce objects to the declaration of Shelly Johnson dated June 11, 2008, and the exhibits
25 thereto, insofar as such declaration and exhibits are submitted in support of Wells Fargo Bank's
26 ("WFB") motion to dismiss.

27 The grounds for the objection are that because a Rule 12(b)(6) motion to dismiss tests the
28 legal sufficiency of the complaint, and because the court accordingly cannot consider material

1 outside the complaint such as in affidavits, the Johnson declaration may not be considered and must
2 be stricken from the record. *Paulsen v. CNF, Inc.*, 391 F.Supp.2d 804, 807 (N.D. Cal 2005).

3 Neither the Johnson declaration nor its attachments are made admissible according to the
4 authorities that permit the introduction into evidence of documents referred to in the complaint but
5 not attached to the complaint. Under these authorities “a document is not ‘outside’ the complaint if
6 the complaint specifically refers to the document and if its authenticity is not questioned.” *Branch*
7 *v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)¹ (overruled on other grounds in *Galbraith v. County of*
8 *Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Neither of those criteria for admissibility are
9 satisfied here, however, because although paragraph 6 of the complaint refers to a change in control
10 plan: (1) the complaint does not identify which plan is being referred to, and the evidence
11 establishes that there were apparently at least three versions of a change in control plan in existence
12 at the time in question; and (2) the authenticity of the change in control plan attached as Exhibit 1
13 to the Johnson declaration is indeed questioned.

14 The evidence establishing that there were at least three versions of the plan is provided by
15 the declaration of Pierce. That declaration shows that when the complaint was filed he knew of
16 only two versions, namely the version in force up to June 19, 2007 and the version that came into
17 effect after June 19, 2007.² Pierce also explains in his declaration that he later learned of the
18 existence of a third version of the plan that allegedly became effective as of September 28, 2007,
19 which is the same document as Exhibit 1 to the Johnson declaration.³ Thus, since Pierce did not
20 know of the September 28, 2007 version of the plan when he filed the action, he could not possibly
21 have been referring to that version of the plan in his complaint. Under the circumstances, Exhibit 1
22 to the Johnson declaration is neither specifically referred to in the complaint nor is its authenticity
23 unquestioned, and the document therefore does not satisfy the standards for admissibility on the
24

25
26 ¹. The holding in *Branch v. Tunnell* was expressly applied in *Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th
27 Cir. 1998) relied on by WFB in its Reply at 2:24-3.4. Notably, WFB acknowledges that this holding
applies only “if the parties do not dispute the authenticity of the document” – which is not the case here.

28 ². Supplemental Declaration of Patrick Pierce dated June 13, 2008 (“Supp. Pierce Dec.”) (Document 30),
¶ 2 and Exhibits “A” and “B”.

³. Supp. Pierce Dec., ¶ 3 and Exhibit “C”.

1 motion to dismiss, and is inadmissible.⁴

2 Also inadmissible on the motion to dismiss is Exhibit 2 to the Johnson declaration, since
3 this document is also clearly outside the complaint, in that it is not referred to in the complaint
4 either. Thus, the exception discussed above based on cases such as *Branch v. Tunnell* has no
5 application to Exhibit 2, and it too is inadmissible on the motion to dismiss.

6 **2. Amended Errata (Document 34)**

7 Pierce also objects to the admissibility of the Amended Errata To Defendant Wells Fargo
8 Bank, N.A.'s Opposition to Plaintiff's Motion for Remand (the "Amended Errata"), and to the
9 incorporation by reference of exhibits to the declaration of Greg J. Richardson dated June 6, 2008.

10 The grounds for the objection to the Amended Errata are as follows:

- 11 1. Exhibit 1 is the same document as Exhibit 1 to the Johnson declaration, discussed
12 above, and is inadmissible with respect to the motion to dismiss for the reasons
13 already discussed above. In addition, the exhibit is also inadmissible on the grounds
14 of lack of personal knowledge and hearsay (Federal Rules of Evidence 602 and 802),
15 in that the sponsoring Richardson declaration provides no foundation upon which
16 Mr. Richardson, as outside counsel for defendant, would have personal knowledge
17 of the authenticity of defendant's internal corporate records in general, and of the
18 change in control plan in particular. Further, the document is not made admissible
19 as a hearsay exception under Federal Rule of Evidence 803(6), because the
20 referenced document is not a memorandum, report, etc. of acts, events, conditions,
21 etc. that was made at or near the time of the acts, nor does it meet the other
22 requirements of the exception. Indeed, it is counter-intuitive to suggest that an
23 outside law firm might regularly maintain defendant Wells Fargo Bank's business
24 records as part of the law firm's own records.

27 ⁴. Pierce does not object to the Johnson declaration being admitted into evidence in opposition to the
28 motion to remand, and consequently does not object to the Request for Judicial Notice of that document
for that limited purpose – but it may not be admitted for purposes of the 12(b)(6) motion.

2. Exhibit 2 is the same document as Exhibit 2 to the Johnson declaration, discussed above, and is also inadmissible with respect to the motion to dismiss for the reasons already discussed above. Exhibit 2 is also inadmissible by reason of lack of personal knowledge and hearsay, for the reasons discussed in the immediately preceding section. Further, WFB's assertion that the document "is provided to the Court for reference purposes, not as evidence," does not immunize it from the above objections, nor does that assertion provide on any recognized basis upon which a document may be submitted to a court in connection with the opposition to a motion.

3. **WFB's Reply in Support of Motion to Dismiss** (Document 36)

Pierce objects to the references in WFB's Reply that recite the inadmissible evidence objected to above, namely all references to the alleged provisions of the Change in Control Plan. Pierce requests that such references to inadmissible evidence be stricken from the Reply. The objectionable passages are the following (identified by page and line):

2:1-6; 3:19-21; 5:10-13; 5:20-21; 5:27-28 (fn. 4); 7:3-5; 7:11-13; 7:25-28 (fn. 6); and 10:2-5.

Dated: June 18, 2008

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